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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

FRED CAMERON, JEFF BOWER,
DAN McWILLIAMS, and DAVID CORTEZ,
Petitioners,

vs.

ANHEUSER BUSCH, INC., ROBERT WARNER, GEORGE LOGAN, RUSS WHITMEYER AND ASSOCIATES, INC., and Does 1 through 100, inclusive,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Did the United States Court of Appeals, Ninth Circuit, act in a manner contrary to the requirements of 29 U.S.C. § 185, Labor Management Relations Act, section 301 preemption (LMRA § 301 preemption) described by this Court in *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 114 S.Ct. 2239, 129 L.Ed.2d 203 (1994) and *Livadas v. Bradshaw*, 512 U.S. 107, 114 S.Ct. 2068, 129 L.Ed.2d 93 (1994)? The United States Court of Appeals, Ninth Circuit, affirmed the district court's ruling that section 301 preempts state law claims for false imprisonment, defamation, wrongful termination, invasion of privacy and intentional infliction of emotional distress even though the evidence was uncontroverted that the collective bargaining agreement contained no language which would necessitate its interpretation for the resolution of the state law claims. Other circuits, even after *Norris* and *Livadas*, continue to be confused regarding the circumstances under which LMRA § 301 preemption applies.

PARTIES TO THE PROCEEDING

The parties to the proceeding below were the petitioners and plaintiffs Fred Cameron (Cameron), Jeff Bower (Bower), Dan McWilliams (McWilliams), and David Cortez (Cortez), and defendants Anheuser Busch, Inc. (ABI), Robert Warner (Warner) (Human Resources Manager), George Logan (Logan) (Assistant Human Resources Manager), and Russ Whitmeyer and Associates, Inc. (RWA) (Independent Drug Search Firm).

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PETITION FOR WRIT OF CERTIORARI

Petitioners Fred Cameron, Jeff Bower, Dan McWilliams, and David Cortez respectfully pray that a writ of certiorari issue to review the order of the United States Court of Appeals, Ninth Circuit, affirming the district court's grant of summary judgment, entered in the above proceeding on October 23, 1997, and the order of the United States Court of Appeals, Ninth Circuit, denying petition for rehearing and rejecting suggestion for rehearing en banc, entered in the above proceeding on December 12, 1997.

OPINIONS BELOW

The United States Court of Appeals, Ninth Circuit, issued an Order affirming the district court's grant of summary judgment, and is reprinted herein as Appendix ("App.") A. The United States Court of Appeals, Ninth Circuit, issued an Order denying petition for rehearing and rejecting the suggestion for rehearing en banc, and is reprinted herein as Appendix B. The Judgment of the district court was not reported, and is reprinted herein as Appendix C. The Statement of Uncontroverted Facts and Conclusions of Law was not reported, and is reprinted herein as Appendix D.

JURISDICTION

The Order by the United States Court of Appeals, Ninth Circuit, affirming the district court's grant of summary judgment was entered on October 23, 1997 (App. A). The Order by the United States Court of Appeals, Ninth Circuit, denying petition for rehearing and rejecting the suggestion for rehearing en banc was entered December 12, 1997 (App. B). The jurisdiction of this Court to review the Order of the United States Court of Appeals, Ninth Circuit, is invoked under 28 U.S.C. § 1291.

STATUTORY PROVISIONS INVOLVED

Title 29 U.S.C.A. § 185 and 45 U.S.C.A. § 151a are set forth in Appendix E herein.

STATEMENT OF THE CASE

A. The August 18, 1995 Drug Search

On August 18, 1995, at approximately 4:30 p.m., after the swing shift began, ABI secured the parking area by locking with chains and padlocks the lot gates to Haskell Street and Woodley Avenue, preventing vehicles from entering or leaving the employee parking lots. ABI also prevented employees from entering the parking lot from the plant side by disabling the turnstile exits. According to established company policy, hourly employees were required to leave the plant through the turnstiles, using card keys to activate the turnstiles. Employees who completed their shift (such as Cortez who worked a 12-hour shift at the company's request) were not allowed to leave the plant.

After the gates and turnstiles were locked, RWA, a drug search firm, employed drug sniffing dogs to comb through the parking lots to detect any vehicles which have the scent of drugs. If the dogs smelled drugs, the dogs indicated by sitting down. A second canine was used to confirm the drug detection. The vehicle was then tagged as having drugs in it.

After the vehicle was tagged, the owner was identified and taken to a conference room filled with RWA employees. The employees were asked if they were aware that new search signs had been posted in the plant. Neither Cameron, Bower, nor McWilliams had seen these signs ever before. The employee was then "asked" to sign a consent to vehicle search. In reality the employee is told that, if they refused to sign the consent form, they would be terminated. The employee was never told why they were brought into the room, nor that they were under suspicion of possessing drugs.

Although the consent form is titled "CONSENT TO VEHICLE SEARCH," in the body of the document is language allowing the company to search the employee's person and all of his personal belongings. This was never explained to the employee. This document was never used prior to August 18, 1995, and the employees saw it for the first time that day. They were not told what the new policy was, nor understood what was involved in the investigation.

When Cameron asked Logan to see a copy of the new policy, Logan was unable to produce it. Cameron felt that his personal right to privacy was being violated, and refused to consent to the search. Cameron was suspended and later terminated because of his "insubordination."

If the employee signed the consent form, they were immediately told to take their shoes and socks off, turn their socks inside out, take everything out of their pockets, turn their pockets inside out, and in many cases were subjected to body pat downs. Their personal belongings, wallets, backpacks, pagers, hats, belts, and the like, were gone through by RWA employees. Again the employee was never explained why they were being subjected to this treatment. Bower and McWilliams were searched in this manner.

After the body search, the employee was driven to his vehicle for the vehicle search. The employee was told to stand approximately 15 feet in front of his vehicle while the search team went over every inch of the vehicle. The employee was not able to see the search of his vehicle being conducted.

The search team videotaped the search while the vehicle was being examined. The search team went through the glove box, between the seats, under the seats, on the floor, ashtray, and in the case of Bower's vehicle, through his tool box in the flat bed of his truck. The vehicle search lasted approximately 20 minutes.

The vehicle search was conducted in the employee parking lot in the presence of many co-workers looking on. Even if no drugs were found, as in the case of McWilliams, the

employee was labeled as a "druggie" by his co-workers. The search was not done discretely out of the view of other employees. Rather, the employee was subjected to severe humiliation as they stood in front of their vehicle in the employee parking, knowing that other employees were aware of the fact that this was a drug search.

When the search team found the hemostat ("roach clip") and rolling papers in the bottom of Bower's glove box, Boxer was taken to Warner, suspended, and escorted out of the plant. When no drugs were found in McWilliams' vehicle, the search team, without an utterance of an apology, drove away and left McWilliams standing alone in the parking lot.

Bower was terminated for being in possession of drug paraphernalia. Like Cameron, he received his termination notice prior to the termination hearing between his union and ABI. Never before in its history had ABI terminated an employee for having a hemostat in his vehicle. Bower was never notified of the new policy, nor given any lenience because the policy was newly created.

B. Procedural History

1. Proceedings in the District Court

On November 21, 1995, Plaintiffs/Petitioners Fred Cameron, Jeff Bower, Dan McWilliams, and David Cortez (hereinafter collectively "Plaintiffs"), filed a civil complaint, Case Number BC 139 465, in Los Angeles Superior Court against Defendants/Respondents Anheuser Busch Inc., Robert Warner, George Logan (hereinafter collectively "ABI"), and Russ Whitmeyer and Associates, Inc. (hereinafter "RWA") for invasion of privacy, false imprisonment, defamation, intentional infliction of emotional distress, and wrongful termination.

On December 20, 1995, Defendants Anheuser Busch, Inc. (hereinafter ("AB"), Robert Warner (hereinafter "Warner"), and George Logan (hereinafter "Logan"), (hereinafter

collectively as "ABI" or "Defendants"), filed a notice of removal of this action in which they alleged that the United States District Court, Central District, had federal question subject matter jurisdiction under 28 U.S.C. § 1331, 28 U.S.C. § 1337, 28 U.S.C. § 1441, and section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (hereinafter "LMRA § 301"). On December 20, 1995, Defendant Russ Whitmeyer and Associates, Inc. (hereinafter "RWA"), filed a notice of joinder in notice of removal.

On December 29, 1995, Plaintiffs filed a Motion for Remand set for hearing on January 22, 1996. On January 22, 1996, Judge A. A. Hauk denied the motion to remand.

ABI and RWA filed a Motion for Summary Judgment or Alternatively Motion for Partial Summary Judgment. On July 8, 1996, Judge A. A. Hauk heard oral argument on the motion. ABI and RWA filed a Statement of Uncontroverted Facts and Conclusions of Law on July 8, 1996. On that same day, Judge A. A. Hauk filed the Judgment and Order, stating "Plaintiffs shall take nothing on their complaint against Defendants, terminating case." The Judgment and Order was entered on July 9, 1996. On July 8, 1996, the Minutes were filed by Judge A. A. Hauk, stating "motion for summary judgment is granted; motion for partial summary judgment is granted." Judgment was entered on July 9, 1996. The Notice of Entry of Judgment was filed on July 16, 1996 and entered on July 18, 1996.

2. Proceedings On Appeal

Plaintiffs timely filed the Notice of Appeal on July 29, 1996. The Civil Appeals Docket Sheet was also timely filed on July 29, 1996. The Transcript Designation and Ordering Form was timely filed on August 14, 1996. The Trial Court Docket Sheet contains the entire docket, CR 1 to CR 46, through July 29, 1996. The appellate brief was timely filed, pursuant to the clerk's order of August 2, 1996. The United States Court of Appeals, Ninth Circuit, has jurisdiction over

the appeal from a final order and judgment under 28 U.S.C. § 1291.

Oral argument was heard on October 6, 1997 in Courtroom 2 before Circuit Judges Pregerson, D.W. Nelson, and Hawkins. Surprisingly, on October 23, 1997, just 17 days after oral argument, the Court of Appeals issued a one line Order stating "We affirm the District Court's grant of summary judgment to appellees."

Plaintiffs timely filed a petition for rehearing and suggestion for rehearing en banc. On December 12, 1997, the same panel issued an Order which stated:

> "The panel has voted to deny appellants' petition for rehearing and to reject the suggestion for rehearing en banc. ¶ The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehearing the matter en banc. Fed. R. App. P. 35. ¶ The petition for rehearing is denied and the suggestion for rehearing en banc is rejected."

WHY CERTIORARI SHOULD BE GRANTED

REVIEW IS WARRANTED BECAUSE THERE IS CONFUSION AMONG THE CIRCUITS AS TO WHEN LMRA § 301 PREEMPTION APPLIES AND BECAUSE THE NINTH CIRCUIT IS NOT FOLLOWING THIS COURT'S DECISION IN *NORRIS* AND *LIVADAS*.

1. The Ninth Circuit, As Well As Other Circuits, Are Still Confused As To When LMRA § 301 Preemption Applies To Invasion Of Privacy Claims.

The Ninth Circuit recently recognized in the case of *Norman-Bloodsaw v. Lawrence Berkeley Laboratories*, 98 Daily Journal D.A.R. 1215, 1218 (February 4, 1998) that:

> "To assert a cause of action [for invasion of privacy] under Article 1, §1 of the California Constitution, one must establish three elements: (1) a legally protected privacy interest; (2) a reasonable expectation of privacy under the circumstances; and (3) conduct by the defendant that amounts to a 'serious invasion' of the protected privacy interest. *Loder v. City of Glendale*, 927 P.2d 1200, 1228 (Cal. 1997) (quoting *Hill v. National Collegiate Athletic Ass'n*, 856 P.2d 633, 657 (Cal. 1994), *cert. denied*, 118 S.Ct. 44 (1997)). These elements must be 'viewed simply as "threshold elements," ' after which the court must conduct a balancing test between the "countervailing interests" for the conduct in question and the intrusion on privacy resulting from any conduct. A showing of 'countervailing interests' may, in turn, be rebutted by a showing that there were 'feasible and effective alternatives' with a 'lesser impact on privacy interests.' *Hill*, 865 P.2d at 657."

In this case, the district court dismissed Plaintiffs' claim of invasion of privacy on the basis of broad preemption principles cited in a line of pre-*Norris* Ninth Circuit cases. ABI argued to the district court and later to the court of appeals that it had an inherent management right to conduct drug searches, search its employees' persons and vehicles, and terminate employees without warning. ABI admitted that only one of the four CBAs involved contained management rights language. As for the other three CBAs, ABI argued that it had the right to the searches under the just cause provision. Even though the district court and the court of appeals were aware that nothing in the CBAs addressed drug searches, the courts still found preemption. Given this Court's narrowing of preemption, the Ninth Circuit's decision is most disturbing.

The Ninth Circuit relied on *Utility Workers of America, Local 246 v. Southern California Edison Co.*, 852 F.2d 1083 (9th Cir. 1988), *cert. denied*, 489 U.S. 1078, 109 S.Ct. 1530,

103 L.Ed.2d 835 (1989); *Laws v. Calmat*, 852 F.2d 430 (9th Cir. 1988); *Stikes v. Chevron USA, Inc.*, 914 F.2d 1265 (9th Cir. 1990), *cert. denied*, 500 U.S. 917, 111 S.Ct. 2015, 114 L.Ed.2d 1010 (1991); and *Schlachter-Jones v. General Tel. Of California*, 936 F.2d 435 (9th Cir. 1991) for its decision. Despite Plaintiffs/Petitioners' argument that this Court's cases of *Hawaiian Airlines v. Norris*, 512 U.S. 246 (1994) and *Livadas v. Bradshaw*, 512 U.S. 107 (1994) implicitly overruled such broad sweeping preemption, the Ninth Circuit affirmed summary judgment on that basis without explanation or clarification as to why this Court's directive should not be followed in this case.

This Court made its last pronouncement regarding LMRA § 301 (and RLA) preemption in the 1994 companion cases of *Hawaiian Airlines v. Norris*, 512 U.S. 246 (1994) and *Livadas v. Bradshaw*, 512 U.S. 107 (1994). In *Livadas*, this Court, citing its earlier opinion in *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 108 S.Ct. 1877 (1988), held that the preemptive effect of section 301 is not as broad as earlier cases had indicated:

> "Section 301 cannot be read broadly to preempt non-negotiable rights conferred on individual employees as a matter of state law, and we stress that it is the legal character of a claim, as 'independent' of rights under the collective bargaining agreement, [citations] that decide whether a state cause of action may go forward." *Livadas*, 512 U.S. at 107, 144 S.Ct. at 2078.

This Court mirrored that opinion in *Hawaiian Airlines v. Norris* under the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.* In the *Norris* decision, this Court held that the preemption standards under the two labor statutes had converged in its jurisprudence and that, henceforth, it would use the section 301 standard articulated in *Lingle* (and reiterated in *Livadas*) as the "appropriate framework for addressing preemption under the RLA . . ." *Norris*, 512 U.S. at 262, 114 S.Ct. at 2249.

In *Livadas*, this Court pointed out that confusion exists in determining when preemption applies and that "the Courts of Appeals have not been entirely uniform in their understanding and application of the principles set down in *Lingle* and *Lueck*." *Livadas*, 512 U.S. at 124, 114 S.Ct at 2078, n.18. Since the *Livadas* and *Norris* decisions, considerable confusion still exists among the circuits, and particularly in the Ninth Circuit, as to under which circumstances preemption applies. Despite this Court's narrowing of the scope of preemption, many post-*Norris* decisions in the various circuits (including this decision by the Ninth Circuit) still apply broad preemption principles contrary to this Court's directive.

In this case, the Ninth Circuit affirmed the district court's grant of summary judgment based on four pre-*Norris* invasion of privacy cases which contain broadly sweeping preemption language. While acknowledging in *Espinal v. Northwest Airlines*, 90 F.3d 1452, 1456 (9th Cir. 1996) that *Norris* "substantially narrowed the scope of RLA [and LMRA] preemption and implicitly overruled more expansive definitions," the Ninth Circuit curiously ignored the impact of *Livadas* and *Norris* previous case law in this situation.

In *Utility Workers*, the Ninth Circuit first concluded that a union's California constitutional privacy claims on behalf of its members were preempted (and thus extinguished) under section 301, solely because "resolution of the issue whether Local 246 has bargained away its members' claimed constitutional rights must rest upon the [management rights clause] of the collective bargaining agreement . . ." *Utility Workers*, 852 F.2d at 1086. Given this Court's decisions in *Livadas* and *Norris*, this reasoning is no longer valid.

Like *Hawaiian Airlines*, the defendant in *Norris*, the defendants in *Utility Workers* argued that section 301 preempts California constitutional privacy claims simply because a provision of the collective bargaining agreement might provide a basis to justify their conduct, notwithstanding the general state law proscribing it. But in *Norris*, this Court clearly held that preemption does not occur merely

because a defendant's conduct is "*arguably justified* by the terms of the parties' collective bargaining agreement." *Norris*, 512 U.S. at 265, 114 S.Ct. at 2250. (Emphasis in original.)

In *Laws v. Calmat*, decided almost concurrently with *Utility Workers*, the Ninth Circuit extended the seep of its erroneous section 301 doctrine. As in *Utility Workers* drug testing prompted another privacy claim under the California Constitution, and the defendant raised a preemption defense even though the collective bargaining agreement did not specifically, much less "clear[ly] and unmistakabl[y]" discuss drug testing. The Ninth Circuit was undeterred.

In *Laws*, the Ninth Circuit held that the plaintiff's claim was, nevertheless, "substantially dependent upon" the collective bargaining agreement, observing that "[a] drug and alcohol testing program, upon which all employees' continued employment depends is a working condition whether or not it is specifically discussed in the [collective bargaining agreement]." *Laws*, 852 F.2d at 433. However, by holding that the privacy claims were preempted merely because the underlying facts implicated a condition of employment that might have been addressed in the collective bargaining agreement, the Ninth Circuit was effectively depriving all unionized employees covered by a collective bargaining agreement of the protection of the California constitutional right to privacy, a practice clearly condemned in *Livadas*.

In *Livadas*, this Court pointed out that the California Labor Commissioner's decision to simply deny state-law penalties to union members impermissibly imposed upon them the "unappetizing choice" of "having state-law rights . . . enforced or exercising the right to enter into a collective bargaining agreement with an arbitration clause." *Livadas*, 512 U.S. at 117, 144 S.Ct. at 2075. The Ninth Circuit's *Laws* decision presents unionized employees with the similar choice: **either** retain enforceable privacy rights under the California Constitution **or** exercise the federal right to enter into a collective bargaining agreement. *Laws*, 852 F.2d at 433. *Livadas* teaches that the imposition of such a choice is

not only not required by federal preemption principles, it is positively **prohibited** by them. *Livadas*, 512 U.S. at 126-130, 144 S.Ct. at 2079-2082. [1]

In *Stikes v. Chevron USA, Inc.*, the Ninth Circuit followed its earlier decisions of *Laws* and *Utility Workers. Stikes*, 914 F.2d at 1268. The Circuit went further, however, and amplified exactly why claims for violations of California's constitutional right to privacy require that any collective bargaining agreement must be consulted, thus purportedly leading inexorably to the preemption finding:

> "Stikes' right to privacy claim is inextricably intertwined with the collective bargaining agreement. This is because a violation of California's constitutional right to privacy requires both that an individual have a 'personal and objectively reasonable expectation of privacy' and that the expectation 'has been infringed upon by an unreasonable . . . intrusion' [citations omitted].
>
> . . . .
>
> Here, the district court could not ascertain Stikes' expectation of privacy at the workplace without considering the conditions of his employment enumerated in the collective bargaining agreement [citation omitted] ('what constitutes a "reasonable" expectation of privacy depends on the circumstances and is measured by common habits in the use of domestic and business properties' [citations omitted]). By the same token, it could not assess whether Chevron's search of the car constituted an unreasonable intrusion without understanding the

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[1] Paraphrasing Circuit Judge Kozinski's observation with respect to such a choice, "[i]t is not inconceivable that an employer could point to this discrepancy as an argument against an effort to unionize: 'Look here, if you vote for the union, the first thing that happens is that [you lose your right to privacy under California's Constitution].' " *Livadas v. Aubry*, 987 F.2d 552, 563 n.2 (9th Cir. 1991) (Kozinski, C.J., dissenting).

> scope of Chevron's powers provided for in the collective bargaining agreement." *Stikes*, 914 F.2d at 1269.

Here, then, is a frank admission by the Ninth Circuit that its section 301 preemption jurisprudence **always** will result in a preemption finding whenever a union member covered by a collective bargaining agreement asserts a claim under California's right to privacy against his or her employer. Without question, this result is now foreclosed. *See Livadas*, 512 U.S. at 121-124, 114 S.Ct. at 2077-2078.

In *Schlacter-Jones v. GTE*, which is notable mostly for its strict adherence to *Utility Workers*, *Laws*, and *Stikes*, the Ninth Circuit once again applied its rule pursuant to which all union employees covered by a collective bargaining agreement are deprived of any claim to California's constitutional right to privacy in the workplace: "Because GTE's Drug Policy was a term and condition of employment, contemplated by the CBA, in this case the claim for violation of state constitutional rights cannot be resolved without interpreting the agreement. Thus it is not independent and is preempted." *Schlacter-Jones*, 936 F.2d at 442. As clearly demonstrated above, this rule has been soundly rejected by this Court and may no longer be applied.

Plaintiff found one post-*Norris* decision in which the district court followed the *Norris* and *Livadas* decisions. In *Blair v. Schott Scientific Glass Co.*, 945 F.Supp. 123 (S.D. W. Va. 1996), the district court found no LMRA § 301 preemption of plaintiff's invasion of privacy claim. The district court, unlike in this case, correctly shifted the burden of proof to the defendant on the motion for remand.

The *Blair* court cited that the Fourth Circuit summarized the Livadas holding in the case of *Martin Murrieta Corp., Aero & Naval Systems v. Maryland Comm'n on Human Relations*, 38 F.3d 1392, 1398 (4th Cir. 1994) stating that:

> "[i]n holding against LMRA preemption of the plaintiff's claim, the [Livadas] Court relied upon

> the fact that it found no suggestion that the employee's union purported to bargain away the state law wage payment protections at issue. The Court also focused that there was no indication that parties to the CBA understood the arbitration clause to cover such state law claims." *Id.* at 126.

In *Blair*, the defendants claimed that the plaintiff's claim for invasion of privacy was preempted because "the resolution of Plaintiff's claims will require interpretation of the collective bargaining agreement." *Id.* The Court, applying the precepts of *Norris* and *Livadas*, found that:

> "Defendants have not shown that the evaluation of Plaintiff's claims will be 'inextricably intertwined' with consideration of the collective bargaining agreement. There is no suggestion that Plaintiff's union bargaining way the state law claims at issue in this action. Neither is there any indication that the parties to the collective bargaining agreement understood the agreement to cover the state law claims asserted here. [citation omitted] Because Defendants have not shown the adjudication of Plaintiff's state law claims will turn on the meaning of any provision of the collective bargaining agreement, the Court finds and concludes the state claims are independent of the agreement for purposes of § 301 pre-emption." *Id.*

In *Blair*, the Plaintiff alleged that her reasonable expectation of privacy was violated when her employer published "widely details of her medical records and drug and alcohol treatment." *Id.* at 127. Defendants countered by saying that since the "discussions concerning Plaintiff's drug and alcohol use first took place in the labor/management meetings held pursuant to the collective bargaining agreement, any further use of the information obtained in those meetings necessarily implicates the collective bargaining agreement." *Id.*

The *Blair* court rejected the defendant's contention and found that:

> "Defendants do not cite any provision of the collective bargaining agreement concerning their right to make public sensitive information discovered in the context of the labor/management meetings. Neither have they shown that the factual inquiry concerning this claim will turn on the provision of the collective bargaining agreement. As noted above, the mere fact that the collective bargaining agreement may be consulted in the course of the litigation does not trigger the application of complete preemption. *See Livadas*, 512 U.S. at ___, 114 S.Ct. at 2078." *Id.*

The *Blair* decision is a clear indication that invasion of privacy claims are not necessarily preempted by LMRA § 301. Invasion of privacy claims should be examined the way all state law claims should be examined. As the *Blair* court stated, the defendant must cite specific provisions which address the state law claim, and demonstrate that the factual inquiry concerning this claim will turn on the provision of the collective bargaining agreement. *See, Greenfield v. Schmidt Baking Company, Inc.*, 199 W.Va. 447, 460, 485 S.E.2d 391, 404 (1997) (invasion of privacy claim is not preempted by LMRA § 301 because it does not require interpretation of any provision of the CBA for its resolution); *Keehr v. Consolidated Freightways of Delaware, Inc.*, 825 F.2d 133 (7th Cir. 1987) (finding that resolution of invasion of privacy claim in no way depended upon interpretation of CBA and was, therefore, not preempted; noting also that the employer did not suggest that plaintiff's claims were in any way derived from rights or duties provided for under CBA).

Some circuits have stated that they will follow the post-*Norris* narrowing of the scope of preemption. *See, e.g., Felt v. Atchison, Topeka & Santa Fe Ry.*, 60 F.3d 1416, 1420 (9th Cir. 1995) (refusing to follow pre-*Norris* Ninth Circuit case

law in Title VII case); *Espinal v. Northwest Airlines*, 90 F.3d 1452, 1456 (9th Cir. 1996) ("Norris, however, substantially narrowed the scope of RLA preemption, and implicitly overruled more expansive definitions."); *Taggart v. Trans World Airlines, Inc.*, 40 F.3d 269, 272 (8th Cir. 1994) ("We think Norris narrowed the scope of federal preemption under the RLA"); *Westbrook v. Sky Chefs, Inc.*, 35 F.3d 316, 317-318 (7th Cir. 1994) (Norris overrules prior preemption standard). However, widespread confusion continues to grow across the circuits regarding preemption of invasion of privacy claims. Most disturbingly, even after this Court announced its narrow preemption standard in *Livadas* and *Norris*, many courts still follow the broad preemption standard found in the Ninth Circuit litany of cases. For example, the United States District Court, Southern District of Ohio, granted summary judgment on an invasion of privacy claim in the case of *Proffitt v. International Paper Company*, 953 F.Supp. 207 (S.D. Ohio 1996) on the basis of LMRA § 301 preemption.

In *Proffitt*, the plaintiff was required to complete a medical history questionnaire pursuant to company mandated health and safety reviews. Plaintiff refused to answer some of the medical history questions, including but not limited to whether he had experienced a heart attack, had filed workers' compensation claims, had been denied life insurance, or had been rejected for medical service. He filed a grievance on the basis that the questionnaire violated his right to privacy. The company then gave plaintiff a revised questionnaire relating to questions of allergies, colds and shortness of breath. Again, plaintiff refused to answer any of the questions.

The District Court, citing *Stikes*, as well as other pre-*Norris* cases, found LMRA section 301 preempted the invasion of privacy claim and held that:

> "resolution of Mr. Proffitt's privacy claim is substantially dependent upon the interpretation of the terms of the CBA, and is thus preempted by § 301 of the LMRA. Resolution of the privacy claims

> requires the Court to determine whether the intrusion — requiring compliance with the medical evaluation program as a condition of employment — would be highly offensive to a reasonable person. A person's expectation of privacy in the workplace is informed by the rules and regulations under which he or she works, which are set forth in the CBA. Moreover, International Paper established the medical evaluation program to which Mr. Proffitt objects, acting pursuant to their authority under the CBA. Thus, resolution of Mr. Proffitt's privacy claims involves consideration of the terms of the CBA. Therefore, Mr. Proffitt's state law claims are preempted by § 301." *Id.* at 211.

The provision in the collective bargaining agreement to which the district court attached preemption stated that International Paper reserved the "right to establish and require employees to observe company rules and regulations . . ." *Id.* Clearly, this decision is wrong given the language of *Norris* and *Livadas*. The provision upon which the preemption is based is broad and ambiguous. For a court to find that LMRA § 301 preempts an invasion of privacy claim is sweeping and outside of the mandate of *Norris* and *Livadas*.

Another post-*Norris* decision that followed along the same lines was the case of *Dancy v. Fina Oil & Chemical Company*, 921 F.Supp. 1532 (E.D. Texas 1996) out of the Eastern District of Texas. In *Dancy* the plaintiff sued in state court for invasion of privacy and intentional infliction of emotional distress arising out of the company's publication of a list of all employees who received a Letter of Concern. The Plaintiffs asserted that "the list was known as a 'hit list' and that the publication of the list was highly embarrassing and humiliating." *Id.* at 1534. The defendants stated that they had the right to develop and implement an employee absenteeism program under the management rights clause, which provided that "[e]xcept to the extent expressly

limited by any provisions of this Agreement, all regular and customary rights and functions of Management in the conduct of business are exclusively reserved to management." *Id.*, n.1.

The district court, considering this issue as a matter of first impression, sought out "the jurisprudence of other circuits as instructive." *Id.* at 1537. The *Dancy* court looked at invasion of privacy cases which predated *Norris* and *Livadas*, among which it considered the Ninth Circuit cases of *Stikes* and *Schlacter-Jones*. *Id.* More significantly, it did not even consider the effect that *Norris* and *Livadas* would have on its decision.

In *Dancy* the plaintiff argued, as in this case, that their claim for invasion of privacy does not depend on the terms of the CBA. *Id.* at 1538. The company in *Dancy*, as ABI does here, claimed that "the Management Rights Clause grants Fina broad discretion in the development and implementation of an employee absenteeism program." *Id.* The district court found that:

> "[w]hile the Plaintiffs concede that the CBA authorizes that compilation of the list, the compact is silent about the distribution of the list. Fina would argue that the subject is covered by the management-rights language because everything that is neither regulated nor forbidden by the collective bargaining agreement is committed to management's discretion by this residual clause. The determination about what rights the management had in establishing the program will be necessary in addressing the invasion of privacy claim. This determination will establish what the employee can consider to be the solitude or seclusion of an employee. In addition, whether the invasion is highly offensive to a reasonable person will depend on what level of privacy an employee could reasonably expect. Privacy in the workplace is an

> ordinary subject of bargaining and the extent of privacy is a condition of employment. Clearly, resolution of the invasion of privacy claim depends upon the meaning of a collective bargaining agreement." *Id.*

In an even more recent case, *Wall v. Americold Corp.*, 1997 WL 431006 (E.D. Pa.) the district court found that LMRA § 301 preempted claims that the employer violated state law by requiring the employee to submit to a urinalysis and by allowing police to search his locker at work. The company allowed Pennsylvania State Police officers to search Mr. Wall's locker at the plant. Four days later, the plant's personnel manager demanded that Mr. Wall undergo drug testing. When Mr. Wall refused, the plant manger searched his locker and found no drugs. Two days later, Mr. Wall was forced by the plant manager to undergo a urinalysis. The test results were negative.

The company claimed that it had the right to do the search and drug test under its management rights clause which provides that "[n]othing in this Agreement shall limit the Company in its functions of management, such as the rights to . . . direct the workforce . . . to maintain discipline and efficiency, to discipline, suspend or discharge for just cause . . . and to establish and change rules with respect to the conduct and discipline of employees . . ." *Id.* at *1. The Agreement also provides that "[t]he Company shall continue to make reasonable provisions for the safety and health of employees during the hours of their employment" and that "[d]ischarge may be imposed at the discretion of the company for . . . using or being under the influence of, or in possession of, illegal drugs during working hours . . ." *Id.*

The District Court, as in the previous examples, relied on pre-*Norris* cases for its decision. The court found preemption of the claim for privacy even though it was couched as a violation of 42 U.S.C. § 1983. In making its decision, the court referred to the *Laws* case and found that:

> "[t]he balancing test for an invasion of privacy claim requires CBA interpretation: 'the collective bargaining agreement classically provides the context in which an employee's bona fide expectations of privacy and personal security in the workplace are arrayed against the employer's right to exercise supervision and control of a particular kind.' [citation omitted] In *Jackson*, the First Circuit examined a Massachusetts' right-to-privacy statute which, like the Pennsylvania tort, requires a balancing of employee and employer interests. [citation omitted] As here, the CBA in *Jackson* did not address the issue of drug testing. Rather, the employer had enacted a drug testing program pursuant to the CBA's management rights clause. [citation omitted] Further, the CBA provision allowing discharge for use or possession of drugs during work hours implies that this area was subject to collective bargaining. *See Laws v. Calmat*, 852 F.2d 430, 433 (9th Cir. 1988) ("A drug and alcohol testing program, upon which all employees' continued employment depends, is a working condition whether or not it is specifically discussed in the CBA.") Analysis of Plaintiff's invasion of privacy claim is inextricably intertwined with interpretation of a CBA which recognizes Americold's right to manage the plant, direct the workforce, implement safety rules, and discharge employees for illegal use or possession of drugs. Because any state law claim for invasion of privacy would require interpretation of Americold's CBA, that claim cannot be maintained under state law." *Id.* at *3.

The court went on to say that "[t]his is not to say that a drug testing program could never violate an employee's right to privacy . . . [b]ut while 'drug testing obviously implicates important personal rights,' it appears that the right to be free

of drug testing can be negotiated away. *Laws*, 852 F.2d at 433, n.4." *Id.*, n.1.

The district court's focus is misplaced, given the *Norris* and *Livadas* decisions. In fact, this Court, in *Livadas*, warns that "while this sensible 'acorn' of § 301 preemption recognized in Lucas Flour, has sprouted modestly in more recent decisions of this Court . . . it has **not yet become, nor may it**, a sufficiently 'mighty oak' . . ." *Livadas*, 512 U.S. at 122, 114 S.Ct. at 2077. (Emphasis added.) In the area of invasion of privacy preemption, courts across the country have effectively eliminated that claim for union employees without regard to this Court's narrowing of the scope of preemption. Unless this Court takes action, the "sensible acorn" has ballooned into that "mighty oak" in the area of invasion of privacy claims, leaving union employees with fewer rights than their nonunionized counterparts.

In this case, Judge Hawkins asked ABI where it was written in the CBA that they could do person and vehicle searches for drugs. They replied that there was no specific language giving them such authority. Instead, they were relying on a purported longstanding policy of conducting searches of purses and bags, and therefore had an inherent management right to conduct drug searches. ABI presented no evidence to show that the factual inquiry would turn on a specific term of the collective bargaining agreement. Under *Blair*, the claim for invasion of privacy should not be preempted.

Since many circuits are still deciding these cases improperly, Plaintiffs pray that this Court will grant certiorari to examine this problem, and establish uniformity among the circuits.

2. The Ninth Circuit Did Not Consider Whether LMRA § 301 Preempts False Imprisonment Claims.

While the Ninth Circuit has not directly addressed the issue of false imprisonment, it has considered the similar torts of assault and battery, and determined that these torts are not preempted by section 301. *See Galvez v. Kuhn*, 933 F.2d 773 (9th Cir. 1991). In *Galvez*, the plaintiff alleged that the defendant supervisor assaulted and battered him by speeding up the assembly line in such a way as to cause him injury. Defendant claimed this cause of action required interpretation of the CBA and, therefore, was preempted. The Court had little difficulty in rejecting defendant's preemption argument in *Galvez*:

> "Under California law, an assault is 'an unlawful attempt coupled with a present ability to commit a violent injury on the person of another;' a battery is 'any willful use of force or violence upon the person of another.' Cal. Pen. Code Sections 240, 242. The prohibition against such acts exist independent of any contract, as does the state law standard defining their commission. Because **'Section 301 does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law,'** . . . Galvez' claim cannot require interpretation of the agreement's negotiated provisions . . . Galvez' cause of action can be evaluated without interpreting the CBA because the acts alleged would violate state law irrespective of the identity of the wrongdoer or of his victim. They are claims alleging violation of a duty owed to all citizens." (Emphasis added.) *Galvez*, 933 F.2d at 777.

Defendants' acts constituted false imprisonment. First, when ABI locked the gates from the parking lot to the street

and the turnstiles from the facility to the parking lot they violated the Fire Code. This violation is prima facie evidence of false imprisonment. The Fire Code requires that an exit remain open during business hours. Since ABI is a 24-hour operation, this would mean that the exit must remain open always. Cortez was not detained for any purpose, yet he was prevented from leaving the plant for more than an hour. Secondly, Cameron, Bower, and McWilliams were unlawfully detained in the interrogation room and subjected to coercion. The CBA does not contain any terms which permit ABI to conduct such interrogations. Placing Plaintiffs in a room with six to eight search team members was intimidation. Threatening Plaintiffs with termination if they did not sign the "consent" form was clearly outside of the bargaining process.

Defendants rely on *Romero v. Hilton Hotels Corp.*, 137 L.R.R.M. (BNA) 2647 (D. Haw. 1991). *Romero* is clearly distinguishable because the CBA contained an arbitration (*Kagle*) decision, which specified the manner in which a search can be conducted. Since the CBA expressly enumerated search requirements, the CBA was necessary for determining the reasonableness of the conduct and was therefore preempted. Again, in this case, no express language is provided for searches, interrogations, or detentions. The false imprisonment cause of action is not preempted because it is not "inextricably intertwined" with the terms of the CBA.

In *Mathis v. Boeing Co.*, 684 F.Supp. 641 (W.D. Wash. 1987), the district court held that LMRA § 301 did not preempt a state law claim for false imprisonment where a former employee claimed he had been detained by the employer's security guard for approximately four and one half hours, without being allowed to leave, after he admitted to smoking marijuana during lunch on two previous occasions. *Id.* at 642. The false imprisonment claim was not "inextricably intertwined" with the terms of the CBA. *Id.* at

645. The Court found that, although the contract expressly recognized the employer's right to conduct security interviews, it did not convey the right to detain employees for substantial periods of time against their will. *Id.*

Defendants also mention *Majors v. U.S. Air, Inc.*, 525 F.Supp. 853 (D. Md. 1981) a pre-*Lingle* 1981 RLA case. In light of *McCann v. Alaska Airlines, Inc.*, 758 F.Supp. 559 (N.D. Cal. 1991), Majors may not be good law anymore. *McCann*, an RLA case, applies California law of false imprisonment and found that preemption does not apply. *McCann* involves an investigatory detention where the plaintiff was detained for three hours, one hour of which was beyond the end of her shift, and she was not allowed to leave the room even to go to the restroom. The court considered "whether there was a nexus between the state law claims and the collective bargaining agreement, in which case there would be potential for state law interference with federal policy." *Id.* at 564. The court concluded that no provisions in the CBA which even "arguably govern" the dispute, and the dispute has an "obviously insubstantial relationship" with the CBA. *Id.* The court summed up the issue of preemption with the following example:

> "The untenable nature of Alaska's position was . . . [that] . . . under his interpretation of governing law, **even claims of employer torture would be preempted** by the RLA . . . RLA preemption does not swallow all matters which fall into its path. To say that all employer-employee actions are preempted by the RLA would be to say that the RLA employee effectively leaves her non-contractual rights at her employer's doorstep . . . . The contract provisions do not purport to allow or even govern the type of investigation which occurred to Ms. McCann. Nowhere does the CBA grant to Alaska **the right to detain at length, falsely accuse, and interrogate its employees in the**

> **manner allegedly occurred in this case."** (Emphasis added.) *Id.* at 565.

In a more recent case the United States District Court, Eastern District of Michigan considered the issue of false imprisonment after *Norris* and *Livadas* in the case of *Weatherholt v. Meijer Inc.*, 922 F.Supp. 1227 (E.D. Mich. 1996). In *Weatherholt*, the plaintiff was suspected of shoplifting and was detained and interviewed for approximately two hours and forty-five minutes. The plaintiff was suspended and later terminated for theft. The defendants argued that LMRA § 301 preempted plaintiff's claim of false imprisonment because "to prove her false imprisonment claim, Weatherholt has the burden to show that the defendants lacked probable cause to justify the alleged imprisonment [and that] [t]he question of probable cause . . . cannot be answered without reference to the CBA and the company policies and procedures governing apprehension, detention and interrogation of employees suspected of theft, which are incorporated therein." *Id.* at 1231.

The *Weatherholt* court squarely rejected that argument and said that:

> "[i]nitially, this court notes that defendants have failed to proffer any evidence of a specific provision of the CBA or company policy which is directly implicated by Weatherholt's false imprisonment claim. Indeed, the absence of any specific evidence in this regard, distinguishes this case from the authorities cited by defendants in support of preemption. *See Blanchard v. Simpson Plainwell Paper Co.*, 1995 U.S. Dist. LEXIS 5830 (W.D. Mich. 1995) (concluding that the employer's right to direct the workforce included the right to confront an employee with allegations of misconduct based upon illegal drug use, because such drug use was specifically proscribed by the collective bargaining agreement.) Moreover, Weatherholt's

> claim for false arrest under Michigan law is a classic example of a tort claim based upon 'non-negotiable' state law rights independent of rights established between the parties by the CBA. *See Lueck*, 4711 U.S. at 213, 105 S.Ct. at 1912. The right to be free from arrest or imprisonment unsupported by probable cause and the factors defining the scope of this law derive from an independent body of state law, not from the CBA between Meijer and the Union. *Dobiescki v. Palacios*, 829 F.Supp. 229, 234 (N.D. Ill. 1993) ("The probable cause standard under state law has its own meaning independent of the just cause standard of the collective bargaining agreement."); *see Mathis v. Boeing Co.*, 684 F.Supp. 641, 645 (W.D. Wash. 1987) (concludinig that section 301 does not preempt a claim for false imprisonment because the collective bargaining agreement did not 'give Boeing the right to forcibly detain employees for substantial periods of time against their will,' even though the agreement expressly recognized Boeing's right to conduct security interviews.) Although resolution of this state law claim may require consideration of the same factual issues as a federal labor claim, that alone does not provide a basis for holding that the state law claim is preempted. *Lingle*, 486 U.S. at 410, 108 S.Ct. at 1883 . . ." *Id.* at 1231-1232.

In this case, as in *Weatherholt*, ABI produced no evidence to demonstrate that plaintiffs' claim for false imprisonment was preempted by the LMRA § 301 because the CBA was necessary for the resolution of the state law claim. The Ninth Circuit, surprisingly, did not address this issue when it affirmed the lower court's ruling. Even more surprising is the fact that this false imprisonment preemption issue has never been addressed by the Ninth Circuit and the court has declined to examine it.

3. The Ninth Circuit Affirmed LMRA § 301 Preemption Even Though The CBA Was Not Necessary For The Resolution of The State Law Claim.

a. Defamation

California's defamation law establishes nonnegotiable rights and obligations independent of any labor contract. *Tellez v. Pacific Gas and Electric Company, Inc.*, 817 F.2d 536, 538 (9th Cir. 1987). One can sue for defamation regardless of employment status or union membership. *Linn v. United Plant Guard Workers of America, Local 114*, 383 U.S. 53, 61, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966). The *Tellez* Court concluded that permitting a state defamation claim to proceed did not impinge on the authority of the arbitration process contemplated by the parties' CBA. *Tellez*, 817 F.2d at 538. The Ninth Circuit also held in the case of *Jackson v. Southern California Gas Company*, 881 F.2d 638 (9th Cir. 1989) that the defamation claim was not preempted because California law establishes nonnegotiable rights and obligations independent of any labor contract.

For defendants' defamatory statement to be absolutely privileged they must be either required by the CBA or arising out of the grievance proceedings. *Tellez*, 817 F.2d at 538. Furthermore, "While it is true that the court must look at the collective bargaining agreement to determine if the statements are false, and must hear testimony in order to determine the defamatory nature of the statements, nothing in plaintiffs' claims would require the court to interpret provisions of the collective bargaining agreement or the union's constitution." *Smith v. Bates*, 787 F.Supp. 176, 178 (N.D. Cal. 1992).

Courts in other circuits have likewise found no preemption regarding defamation claims. *See Luecke v. Shnucks Market, Inc.*, 85 F.3d 356, 360 (8th Cir. 1996) ("Resolving

Luecke's defamation claim will not depend upon construing article 5: no express or implied term in the provision guides the factual inquiry into whether the speakers actually said Luecke refused to take the test, whether their statements were false, whether malice attached, and whether damages resulted."); *Bill v. Casarona*, 1996 WL 389304, *4 (S.D.N.Y.), 153 L.R.R.M. (BNA) 2564 ("Following the reasoning offered by the Supreme Court in *Lingle* and *Norris*, the Court of Appeals for the Second District recently held that a New York state defamation claim between two employees is not preempted by the [RLA] . . . [and] the Gay[2] rule compels this Court to hold that the LMRA does not preempt plaintiff's defamation claims."); *Mike v. Ron Saxon Ford, Inc.*, 960 F.Supp. 1395, 1398 (D.Minn. 1997) ("Plaintiff's defamation claim in this case is neither premised upon an alleged violation of any term of the collective bargaining agreement, nor dependent upon interpretation of the CBA's terms, and therefore is not preempted by section 301 . . . [because] . . . the defamation claim involves a purely factual inquiry surrounding the alleged publication false and defamatory statements about plaintiff."); *Keehr v. Consolidated Freightways of Delaware, Inc.*, 825 F.2d 133 (7th Cir. 1987) (finding that resolution of defamation claim in no way depended upon interpretation of CBA and was, therefore, not preempted; noting also that the employer did not suggest that plaintiff's claims in any way derived from rights or duties provided for under CBA).

In this case, Defendants' defamatory statements neither resulted from a CBA requirement nor from a grievance proceeding. In fact, it arose out of unlawful conduct never contemplated by the CBA. The claim is nonnegotiable and should not be preempted. Again, the Ninth Circuit did not

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[2] *See Gay v. Carlson*, 60 F.3d 83, 87 (2d Cir. 1995), following *Norris*, holds that the preemption standard for the RLA and the LMRA have dovetailed.

address this claim despite the overwhelming trend in the case law opposing LMRA preemption.

b. Emotional Distress

Like the tort of defamation, intentional infliction of emotional distress "hinges on state of mind, causation and injury." *Tellez*, 817 F.2d at 539. It requires extreme and outrageous behavior when no physical injury is alleged. *Id.* The CBA does not envision such behavior, and its grievance mechanism is not equipped to redress it. *Id.* When the CBA is silent on working conditions and vague on disciplinary formalities, examination or interpretation of the agreement would not help resolve the claim. Therefore, the claim would not be preempted. *See, eg., Greenfield v. Schmidt Baking Company, Inc.*, 199 W.Va. 447, 485, S.E.2d 391 (1997) (the mere existence of a CBA between the parties is not sufficient to require the preemption of intentional infliction of emotional distress claim and none of the CBA provisions are implicated by the specific factual circumstances of the case); *Keehr v. Consolidated Freightways of Delaware, Inc.*, 825 F.2d 133 (7th Cir. 1987) (finding resolution of intentional infliction of emotional distress claim in no way depended upon interpretation of CBA where claim arose from derogatory comments supervisor made about employee's wife; noting that it was not suggested that plaintiff's claims were in any way derived from rights or duties provided for under CBA); *Lindemuth v. Goodyear Tire and Rubber Co.*, 19 Kan.App.2d 95, 864 P.2d 744 (1993) (determining that § 301 is designed to protect statement made during the bargaining sessions and grievance proceedings, and, thus, intentional infliction of emotional distress claim based upon conduct that occurred prior to the grievance procedure would not be preempted); *Commodore v. University Mechanical Contr.*, 120 Wash.2d 120, 839 P.2d 314 (1992) (concluding that cause of action for outrage was not preempted where defendants failed to point to a any specific terms of CBA requiring interpretation to resolve any element

of outrage claim; commenting additionally that action was not preempted because it was independent (i.e., it could have been brought by an employee in the absence of a CBA)).

In this case, defendants' conduct was so outrageous that plaintiffs suffered emotional distress as a result. Defendants unlawfully detained plaintiffs, coerced their consent, subjected them to humiliating body searches, embarrassed and humiliated them by conducting vehicle searches in the presence of co-workers. Such conduct is clearly outside the scope of the CBA. Since the CBA is silent on "drug searches," no interpretation of the CBA is required to resolve this claim. Therefore, this claim is not preempted by LMRA section 301.

c. Wrongful Termination

The Ninth Circuit, in *Paige v. Henry J. Kaiser Co.*, 826 F.2d 857, 863 (9th Cir. 1987), concluded that the tort of wrongful termination in violation of public policy exists independent of any contractual right. In that case the court determined that Cal/OSHA violation was not intertwined or substantially dependent upon consideration of the terms of the CBA. *Id.* Likewise, the U.S. Supreme Court recently determined that wrongful termination in violation of public policy for whistleblowing was not preempted by RLA. *Norris*, 512 U.S. at 266, 114 S.Ct. at 2251. The Court stated that the RLA preemption standard is identical to the LMRA section 301 standard. *Norris*, 512 U.S. at 260, 114 S.Ct. at 2247.

The California State Court of Appeal found that "the assertion of the constitutional right to privacy is the assertion of a fundamental principle which is sufficient to state a cause of action for wrongful termination." *Semore v. Pool*, 217 Cal.App.3d 1087, 1098, 266 Cal.Rptr. 280 (1990). Since the invasion of privacy is not preempted, wrongful termination for asserting such an independent right should likewise be independent and hence not preempted.

4. The Ninth Circuit's Decision Means That Unionized Employers Could Wrongfully Imprison And Search Their Employees In Violation Of Public Policy Since They Are Insulated From Liability.

The public policy of the State of California and the United States of America dictate that when one person willfully harms or injures another, the aggrieved individual can bring his or her claim to a neutral forum to adjudicate. The Ninth Circuit's decision in this case totally circumvents that possibility and leaves victims unable to redress their injuries. ABI's conduct on August 18, 1995, was not only outrageous and egregious, but it was criminal.

The Ninth Circuit's decision resonates throughout the circuits that unionized employers could wrongly imprison and search their employees without fear of their day of judgment because they have a mighty shield called the collective bargaining agreement which insulates them from liability through an oft-misunderstood law called LMRA section 301. Unfortunately, the courts are still in a confused state regarding this preemption principle, and now time is ripe for this Court to set the record straight in this legal quagmire once and for all. Indeed the "sensible acorn" has become the "mighty oak." Petitioners pray that this Court will revisit its decisions in *Norris* and *Livadas* by granting this petition.

CONCLUSION

For the foregoing reasons, Petitioners submit the petition for a writ of certiorari should be granted.

March 6, 1998.

Respectfully submitted,

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NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
OCT 23, 1997
Cathy A. Catterson, Clerk
U.S. COURT OF APPEALS

FRED CAMERON; JEFF BOWER;
DAVID CORTEZ; DAN McWILLIAMS,
Plaintiffs-Appellants,
vs.
ANHEUSER-BUSCH, INC.; ROBERT WARNER;
GEORGE LOGAN; RUSS WHITMEYER
& ASSOC., INC.,
Defendants-Appellees.

No. 96-56226

D.C. No. CV-95-08651-AAH-Mcx

ORDER*

Appeal from the United States District Court
for the Central District of California
A. Andrew Hauk, District Judge, Presiding

Argued and Submitted October 6, 1997
Pasadena, California

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Before: PREGERSON, D.W. NELSON, and
HAWKINS, Circuit Judges.

We AFFIRM the District Court's grant of summary judgment to appellees.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
DEC 12, 1997
Cathy A. Catterson, Clerk
U.S. COURT OF APPEALS

FRED CAMERON; JEFF BOWER;
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& ASSOC., INC.,
Defendants-Appellees.

No. 96-56226

ORDER

Before: PREGERSON, D.W. NELSON and
HAWKINS, Circuit Judges

The panel has voted to deny appellants' petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehearing the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

FILED
Clerk, U.S. District Court
JUL 8, 1996
Central District of California
By /s/ Deputy

FRED CAMERON, JEFF BOWER,
DAN MCWILLIAMS, DAVID CORTEZ,
Plaintiffs,

vs.

ANHEUSER-BUSCH, INC., ROBERT WARNER,
GEORGE LOGAN, RUSS WHITMEYER AND
ASSOC., INC., and DOES 1 through 100, inclusive,
Defendants.

Case No. 95-8651 AAH (Mcx)

JUDGMENT

Date: July 8, 1996
Time: 10:00 a.m.
Ctrm: 15

PTC Date: None
Trial Date: None

The Motion of Defendants ANHEUSER-BUSCH, INC., ROBERT WARNER, GEORGE LOGAN, and RUSS WHITMEYER AND ASSOC., INC. for Summary Judgment or, Alternatively, for Partial Summary Judgment pursuant to Fed. R. Civ. P. 56, came on regularly for hearing on July 8, 1996.

The Court having considered the moving, opposing, and reply papers, and the argument of counsel, and having been fully advised and the decision having been made, Defendants are entitled to summary judgment pursuant to Fed. R. Civ. P. 56.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. Plaintiffs shall take nothing on their Complaint against Defendants;
2. Defendants shall recover their costs from Plaintiffs in the amount of $_____;
3. There being no just cause for delay, the Clerk is ordered to enter this judgment forthwith.

DATED: 7/8/96

/s/ A. ANDREW HAUK
HONORABLE A. ANDREW HAUK
United States District Judge

Presented by: Dated: May 7, 1996

BALLARD, ROSENBERG & GOLPER
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Case No. 95-8651 AAH (Mcx)

DEFENDANTS ANHEUSER-BUSCH, INC., ROBERT WARNER, GEORGE LOGAN, AND RUSS WHITMEYER AND ASSOC., INC.'S STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT, OR, ALTERNATIVELY, PARTIAL SUMMARY JUDGMENT; ORDER THEREON

Date: July 8, 1996
Time: 10:00 a.m.
Ctrm: 15

PTC Date: None
Trial Date: None

Defendants ANHEUSER-BUSCH, INC., ROBERT WARNER, GEORGE LOGAN, and RUSS WHITMEYER AND ASSOC., INC. lodge this Statement of Uncontroverted Facts and Conclusions of law in support of their Motion for Summary Judgment, or, Alternatively, Partial Summary Judgment pursuant to Local Rule 7.14.1.

I. UNCONTROVERTED FACTS

A. THE PLAINTIFFS WERE ALL EMPLOYED PURSUANT TO A CBA WITH ABI AND THEIR RESPECTIVE UNIONS

Uncontroverted Facts **Evidence**

1. Plaintiff FRED CAMERON ("CAMERON") was employed with ABI pursant to a CBA between ABI and the International Association of Machinists, District Lodge 94 ("IAM").

Warner Decl.: ¶ 3, and Exhibit "1" thereto; Response to Admission No. 1 (Exhibits "16", "17"); Fuchsman Decl.: ¶ 6, and Exhibits "16", "17" thereto.

2. Plaintiff JEFF BOWER ("BOWER") was employed with ABI pursuant to a CBA between ABI and the International Union of Operating Engineers, Local 501 ("IUOE").

Warner Decl.: ¶ 3, and Exhibit "3" thereto; Response to Request for Admission No. 1 (Exhibits "18", "19", "20"); Fuchsman Decl.: ¶ 7, and Exhibits "18", "19", "20" thereto.

3. Plaintiff DAN MCWILLIAMS ("MCWILLIAMS") was employed with ABI pursuant to a CBA between ABI and the International Brotherhood of Electrical Workers, Local 2291 ("IBEW").

Warner Decl.: ¶ 3, and Exhibit "4" thereto; Response to Request for Admission No. 1 (Exhibits "21", "22", "23"); Fuchsman Decl.: ¶ 8, and Exhibits "21", "22", "23" thereto.

4. Plaintiff DAVID CORTEZ ("CORTEZ") was employed with ABI pursuant to a CBA between ABI and IBEW.

Warner Decl.: ¶ 3, and Exhibits "4" thereto; Response to Request for Admission No. 1 (Exhibits "24", "25"); Fuchsman Decl.: ¶ 9, and Exhibits "24" and "25" thereto.

5. The CBA between ABI and the IAM provides that ABI may discharge employees for "just cause."

Warner Decl.: ¶ 4, and Exhibit "1" thereto.

6. The IAM CBA also contains a grievance and arbitration procedure to challenge ABI's alleged violations of the CBA.

Warner Decl.: ¶ 4, and Exhibit "1" thereto.

7. Although the IAM CBA does not contain an express "management rights" clause, in a recent arbitration between ABI and the IAM, an Arbitrator concluded that ABI had an inherent implied management right to unilaterally implement work rules.

Warner Decl.: ¶ 4, and Exhibit "2" thereto.

8. The CBA with the IUOE provides that ABI may terminate employees for "good cause".

Warner Decl.: ¶ 5, and Exhibit "3" thereto.

9. The CBA with the IUOE also contains a grievance and arbitration procedure to challenge alleged violations of the CBA.

Warner Decl.: ¶ 5, and Exhibit "3" thereto.

10. The CBA with the IBEW provides that "The Company has and will retain the right to manage the plant and direct the working forces, including the right to hire, suspend, or discharge for just cause . . ."

Warner Decl.: ¶ 6, and Exhibit "4" thereto.

11. The IBEW CBA also contains a grievance and arbitration procedure to address alleged violations of the CBA.

Warner Decl.: ¶ 6, and Exhibit "4" thereto.

B. PLAINTIFFS FILED GRIEVANCES UNDER THE CBA ARISING FROM THE AUGUST 18, 1995 SEARCH

12. CAMERON has filed a grievance against ABI pursuant to the IAM CBA challenging his discharge as a result of the same August 18, 1995 search incident which is also the subject of this lawsuit.

Warner Decl.: ¶ 7, and Exhibit "5" thereto; Response to Request for Admission Nos. 3, 4 (Exhibits "16", "17"); Fuchsman Decl.: ¶ 6, and Exhibits "16", "17" thereto.

13. CAMERON's grievance is scheduled to be submitted to binding arbitration in accordance with the arbitration procedure set forth in the CBA with the IAM on April 30, 1996.

Warner Decl.: ¶ 7, and Exhibit "5" thereto; Response to Request for Admission Nos. 3, 4 (Exhibits "16", "17"); Fuchsman Decl.: ¶ 6, and Exhibits "16", "17" thereto.

14. BOWER has filed a grievance under the CBA challenging his discharge as a result of the August 18, 1995 search operation.

Warner Decl.: ¶ 8, and Exhibit "6" thereto; Response to Request for Admission Nos. 3, 4 (Exhibits "18", "19", "20"); Fuchsman Decl.: ¶ 7, and Exhibits "18", "19", "20" thereto.

15. BOWER's grievance was submitted to binding arbitration pursuant to the arbitration procedure in the IUOE CBA, commencing on April 17, 1996.

Warner Decl.: ¶ 8, and Exhibit "6" thereto; Response to Request for Admission Nos. 3, 4 (Exhibits "18", "19", "20"); Fuchsman Decl.:

¶ 7, and Exhibits "18", "19", "20" thereto.

16. Although MCWILLIAMS was not disciplined as a result of the August 18, 1995 search, MCWILLIAMS has filed a grievance against ABI under the CBA which challenges ABI's general conduct.

Warner Decl.: ¶ 9, and Exhibit "7" thereto; Response to Request for Admission Nos. 3, 4 (Exhibits "21", "22", "23"); Fuchsman Decl.: ¶ 8, and Exhibits "21", "22", "23" thereto.

17. MCWILLIAMS's grievance was not pursued to arbitration by his Union.

Warner Decl.: ¶ 9, and Exhibit "7" thereto; Response to Request for Admission Nos. 3, 4 (Exhibits "21", "22", "23"); Fuchsman Decl.: ¶ 8, and Exhibits "21", "22", "23" thereto.

18. CORTEZ has not filed a grievance with respect to the August 18, 1995 search.

Warner Decl.: ¶ 10; Response to Request for Admission Nos. 3, 4 (Exhibits "24", "25"); Fuchsman Decl.: ¶ 9, and Exhibits "24", "25" thereto.

C. PLAINTIFFS ADMIT THAT THEIR UNIONS HAVE NOT BREACHED THE DUTY OF FAIR REPRESENTATION

19. In response to Request for Admission No. 5 which states "Admit that the Union has not breached its duty of fair representation with respect to its handling of the grievance you filed challenging the termination of your employment with ABI", CAMERON responded "Admit".

Response to Request for Admission No. 5 (Exhibits "16", "17"); Fuchsman Decl.: ¶ 6, and Exhibits "16", "17" thereto.

20. In response to Request for Admission No. 5 which states "Admit that the Union has not breached its duty of fair representation with respect to its handling of the grievance you filed challenging the termination of your employment with ABI", BOWER responded "Admit".

Response to Request for Admission No. 5 (Exhibits "18", "19", "20"); Fuchsman Decl.: ¶ 7, and Exhibits "18", "19", "20" thereto.

21. In response to Request for Admission No. 5 which states "Admit that the Union has not breached its duty of fair representation with respect to its handling of the grievance you filed challenging ABI's August 18, 1995 search of your vehicle and person", MCWILLIAMS responded "Admit".

Response to Request for Admission No. 5 (Exhibits "21", "22", "23"); Fuchsman Decl.: ¶ 8, and Exhibits "21", "22", "23" thereto.

22. In response to Request for Admission No. 5 which states "Admit that the Union has not breached its duty of fair representation with respect to your alleged false imprisonment by ABI on August 18, 1995", CORTEZ responded "Admit".

Response to Request for Admission No. 5 (Exhibits "24", "25"); Fuchsman Decl.: ¶ 9, and Exhibits "24", "25" thereto.

D. DEFENDANTS WARNER, LOGAN AND WHITMEYER ARE ALLEGED TO HAVE ACTED ON BEHALF OF ABI AND IN THE COURSE AND SCOPE OF THEIR AGENCY OR EMPLOYMENT WITH ABI

23. Defendant ROBERT WARNER ("WARNER") is employed as ABI's Human Resources Manager at the Los Angeles Brewery.

Warner Decl.: ¶ 2; Complaint, ¶ 4 (Exhibit "12").

24. Defendant GEORGE LOGAN ("LOGAN") is employed as ABI's Assistant Human Resources Manager at the Los Angeles Brewery.

Warner Decl.: ¶ 2; Complaint, ¶ 4 (Exhibit "12").

25. Defendant RUSS WHITMEYER AND ASSOC., INC. ("WHITMEYER"), was retained by ABI to assist with the August 18, 1995 search operation.

Warner Decl.: ¶ 14; Complaint, ¶ 5 (Exhibit "12").

26. Plaintiffs' claims against Defendant WARNER are based on WARNER's alleged conduct in the course and scope of his employment with ABI and on ABI's behalf in connection with the August 18, 1995 search operation.

Fuchsman Decl.: ¶ 2; Complaint, ¶¶ 4, 7, 17, 33 (Exhibit "12").

27. Plaintiffs' claims against Defendant LOGAN are based on LOGAN's alleged conduct in the course and scope of his employment with ABI and on ABI's behalf in connection with the August 18, 1995 search operation.

Fuchsman Decl.: ¶ 2; Complaint, ¶¶ 4, 7, 12, 13, 14, 31, 36, 37 (Exhibit "12").

28. Plaintiffs' claims against Defendant WHITMEYER are based on WHITMEYER's alleged conduct in the course and scope of its agency with ABI and on ABI's behalf in connection with the August 18, 1995 search operation.

Fuchsman Decl.: ¶ 2; Complaint, ¶¶ 5, 7, 31, 36, 37 (Exhibit "12").

E. ABI'S ESTABLISHED SEARCH POLICY

29. For at least ten years, ABI has posted signs on the employee entrances and exits at both the Woodley Avenue and Haskell Street hourly employee parking lots advising employees of ABI's right to search employees and their property, including vehicles parked on ABI property.

Warner Decl.: ¶ 11, and Exhibits "8", "9" thereto.

30. If employees do not wish to have their cars subject to search by ABI, they do not have to park on ABI property as there are approximately 40 to 50 parking spaces available on the street outside the Brewery.

Warner Decl.: ¶ 11.

31. The signs are placed next to the turnstiles used by the hourly employees to enter or leave the Brewery grounds from the parking lot, and employees have to walk past the signs when they enter or leave the Brewery every single day.

Warner Decl.: ¶ 11, and Exhibits "8", "9" thereto.

32. ABI posted additional signs on the outside perimeter of the employee parking lots on August 14 and 15, 1995.

Warner Decl.: ¶ 11, and Exhibits "10", "11" thereto.

33. The perimeter signs are visible from the street, and also advise employees of ABI's right to search employees and their vehicles parked on ABI's property.

Warner Decl.: ¶ 11, and Exhibits "10", "11" thereto.

34. For years, employees leaving the facility with bags or packages have been searched by security guards on a random basis.

Warner Decl.: ¶ 12.

35. Employees refusing to allow the search have been consistently disciplined, including employees that are represented by the Plaintiffs' Unions.

Warner Decl.: ¶ 12.

36. ABI conducted an employee locker room search in approximately 1984 using trained "sniff dogs".

Warner Decl.: ¶ 12.

37. ABI's management right to conduct these searches, or to discipline employees as a result of the search or for refusing to allow the search, has never been challenged by the Plaintiffs' Unions prior to August 18, 1995.

Warner Decl.: ¶ 12.

F. THE AUGUST 18, 1995 SEARCH

38. ABI prohibits the use or possession of illegal drugs in the workplace.

Warner Decl.: ¶ 13.

39. In July 1995, ABI initiated a comprehensive drug program which included drug awareness training and drug testing for salaried employees in "safety-sensitive" positions, and sweeps of the employee parking lots with sniff dogs trained to detect drug residue in the vehicle.

Warner Decl.: ¶ 13.

40. Procedures for drug testing of hourly employees, such as Plaintiffs, are specified in the CBA's.

Warner Decl.: ¶ 13, and Exhibits "1", "3", "4" thereto.

41. ABI maintains that its right to search employees and their property on ABI premises, including vehicles, is an

inherent management right which has been exercised by ABI for over a decade without objection by the Unions.

Warner Decl.: ¶ 13.

42. ABI's anti-drug program was the subject of significant discussion at the Brewery for several weeks prior to the August 18, 1995 search.

Warner Decl.: ¶ 13.

43. ABI retained WHITMEYER, a company with substantial experience assisting employers with drug elimination programs, to participate in the parking lot sweeps.

Warner Decl.: ¶ 14.

44. On August 18, 1995, WHITMEYER deployed several agents with dogs trained to detect drug residue to sniff the vehicles parked in the employee parking lots.

Warner Decl.: ¶ 14.

45. If the dogs identified a vehicle as "positive" for drug residue, ABI determined the owner's identity, the employee was taken to a private room and asked to consent to a search of the vehicle, and if the employee was represented by a Union, the employee's Union Steward was also present.

Warner Decl.: ¶ 14.

46. The suspected employee was also asked to consent to a search of his person which generally consisted of the employee removing his shoes and socks and emptying his pockets, and an examination of other personal belongings that are typically used to hide drugs.

Warner Decl.: ¶ 14.

47. If the suspected employee refused to consent to the search, of if illegal drugs or drug paraphernalia were discovered in the search, the employee was suspended subject to termination.

Warner Decl.: ¶ 14.

48. Since the parking lot operation commenced at approximately 4:30 p.m. on August 18, 1995, after the swing shift began, the majority of the employees from the day shift already had left the facility, and most of the employees working swing shift already had arrived before the operation began.

Warner Decl.: ¶ 15.

49. Except during shift changes when there is heavy employee traffic, the entrances/exits to the employee parking lots are ordinarily kept closed, and employees that need to enter or leave the parking lot at such times must be let in or out by the security guards posted in the parking lot.

Warner Decl.: ¶ 15.

50. To facilitate the August 18, 1995 search operation, the employee entrances/exits to the parking lots were closed while the parking lots were checked, and the electronic turnstile that hourly employees generally use to exit into the parking lot from the Brewery grounds was in manual mode during the search operation.

Warner Decl.: ¶ 16.

51. If an employee wanted to leave, and his car was parked in a section of the lot that was already sniffed by the dogs, the employee was allowed to proceed through the turnstile and leave the parking lot.

Warner Decl.: ¶ 16.

52. If the employee was parked in a section of the lot that had not yet been sniffed for drugs, the employee had to wait until arrangements could be made for his car to be sniffed and cleared, and was then permitted to leave the parking lot.

Warner Decl.: ¶ 16.

53. Limiting access in and out of the parking lot only affected a relatively small number of employees that arrived late for swing shift, or day shift employees that worked overtime into the swing shift.

Warner Decl.: ¶ 16.

54. At all times during the search operation, employees were free to leave the Brewery facility on foot through the delivery entrance on Woodley Avenue.

Warner Decl.: ¶ 16.

55. Although the following scenario did not occur during the August 18, 1995 search, if an employee insisted on leaving the parking lot in his vehicle before it could be sniffed, the employee would have been permitted to leave but would have been subject to disciplinary action.

Warner Decl.: ¶ 16.

56. BOWER and CORTEZ were day shift employees that worked overtime on August 18, 1995 into the swing shift while the search operation was underway.

Warner Decl.: ¶ 17.

57. CORTEZ's vehicle was parked in a section of the Haskell Street parking lot that had already been sniffed, and CORTEZ was permitted to leave the facility although he chose to stay.

Warner Decl.: ¶ 17.

58. Because BOWER's vehicle was parked in a section of the Haskell Street lot that had not yet been sniffed when he wanted to leave, BOWER had to wait by the turnstile while arrangements were made for his vehicle to be sniffed.

Warner Decl.: ¶ 18.

59. After BOWER's vehicle was identified as "positive" by the dog team, BOWER was brought to a private room along

with his Union Steward, and was asked to consent to a search.

Warner Decl.: ¶ 18.

60. After BOWER signed a consent form to allow the search, a search of BOWER's vehicle resulted in the discovery of drug paraphernalia; specifically a "roach clip" and rolling papers.

Warner Decl.: ¶ 18.

61. BOWER was suspended pending further investigation, and was later terminated for violation of ABI's policy prohibiting drugs and drug paraphernalia on company property after the roach clip was sent to a laboratory and tested "positive" for marijuana.

Warner Decl.: ¶ 18.

62. CAMERON was a swing shift employee whose vehicle was also identified as "positive" by the dog team.

Warner Decl.: ¶ 19.

63. CAMERON was brought to a private room along with his Union Steward, and was asked to consent to the search.

Warner Decl.: ¶ 19.

64. CAMERON refused to give consent, was suspended at that time, and then terminated for refusing to consent to the search.

Warner Decl.: ¶ 19.

65. MCWILLIAMS was another swing shift employee whose vehicle was identified as "positive" by the dog team.

Warner Decl.: ¶ 20.

66. MCWILLIAMS was brought to a private room along with his Union Steward, and was asked to consent to the search.

Warner Decl.: ¶ 20.

67. MCWILLIAMS signed the consent form, and a search was conducted.

Warner Decl.: ¶ 20.

68. Although MCWILLIAMS's vehicle had been identified as "positive" for drug residue by the dog team, no drugs or paraphernalia were discovered in the search, and MCWILLIAMS did not receive any discipline as a result of the search.

Warner Decl.: ¶ 20.

II. CONCLUSIONS OF LAW

1. Plaintiffs' first cause of action for invasion of privacy is preempted by Section 301 of the Labor Management Relations Act, as amended ("LMRA"), 29 U.S.C. § 185.

2. Plaintiffs' second cause of action for false imprisonment is preempted by Section 301 of the LMRA.

3. Plaintiffs' third cause of action for defamation is preempted by Section 301 of the LMRA.

4. Plaintiffs' fourth cause of action for intentional infliction of emotional distress is preempted by Section 301 of the LMRA.

5. Plaintiffs' fifth cause of action for wrongful termination in violation of public policy is preempted by Section 301 of the LMRA.

6. To the extent Plaintiffs' state law claims are characterized as claims arising under Section 301 of the LMRA, the claims are legally barred because Plaintiffs' exclusive remedy is under the grievance and arbitration procedure set forth in the CBA's governing their employment.

7. To the extent Plaintiffs' state law claims are characterized as claims arising under Section 301 of the LMRA, the

claims are legally barred because Plaintiffs cannot establish that their respective Unions have breached the duty of fair representation, an essential element for the Section 301 claim.

SO ORDERED.

DATED: 7/8/96

/s/ A. ANDREW HAUK
HONORABLE A. ANDREW HAUK
United States District Judge

Presented by: Dated: May 6, 1996

BALLARD, ROSENBERG & GOLPER
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JEFFREY P. FUCHSMAN

By /s/ JEFFREY P. FUCHSMAN
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RUSS WHITMEYER AND ASSOC., INC.

UNITED STATES CODE ANNOTATED

TITLE 29. LABOR

CHAPTER 7 — LABOR-MANAGEMENT RELATIONS
SUBCHAPTER IV — LIABILITIES OF AND RESTRICTIONS ON LABOR AND MANAGEMENT

Current through P.L. 105-153, approved 12-17-97

§ 185. Suits by and against labor organizations

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction

For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) Service of process

The service of summons, subpena [*sic*], or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency

For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

UNITED STATES CODE ANNOTATED

TITLE 45. RAILROADS

CHAPTER 8 — RAILWAY LABOR
SUBCHAPTER I — GENERAL PROVISIONS

Current through P.L. 105-153, approved 12-17-97

§ 151a. General purposes

The purposes of the chapter are:

(1) To avoid any interruption to commerce or to the operation of any carrier engaged therein;

(2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization;

(3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter;

(4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions;

(5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

Supreme Court, U.S.
FILED
APR 6 1998
OFFICE OF THE CLERK

No. 97-1468

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

FRED CAMERON, JEFF BOWER
DAN McWILLIAMS, and DAVID CORTEZ,
Petitioners,

v.

ANHEUSER BUSCH, INC., ROBERT WARNER, GEORGE LOGAN, and RUSS WHITMEYER AND ASSOCIATES, INC.,
Respondents.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION

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20 pp

PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

Respondent Anheuser-Busch, Inc.'s parent company is Anheuser-Busch Companies, Inc. The only non-wholly owned subsidiary of respondent Anheuser-Busch, Inc. is Somerset Distributors, LLC. Respondent Russ Whitmeyer And Associates, Inc. does not have any parent company or non-wholly owned subsidiaries.

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STATEMENT OF THE CASE

The petition seeks this Court's review of the Ninth Circuit's unpublished one-line order affirming the District Court's order granting summary judgment for respondents. ("We AFFIRM the District Court's grant of summary judgment to appellees.")[1] Petitioners' request for rehearing was denied by the Ninth Circuit panel deciding the appeal (Circuit Judges Pregerson, D.W. Nelson and Hawkins), and the full Ninth Circuit unanimously rejected petitioners' suggestion for rehearing *en banc*.[2] Petitioners argue review of the Ninth Circuit's order is warranted to clear up the "confusion" in the Ninth Circuit and other courts over the scope of preemption under Section 301 of the Labor Management Relations Act ("LMRA") [29 U.S.C. § 185].

As demonstrated below, this Court's review of the Ninth Circuit's order is unwarranted. The unpublished one-line order at issue is non-precedential.[3] The order hardly creates any conflicts between the circuits to be resolved by this Court. Moreover, the Ninth Circuit's order is completely

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[1]The Ninth Circuit's October 23, 1997 order affirming the summary judgment for respondents is attached to the petition as Appendix A. The July 8, 1996 judgment for respondents and the District Court's July 8, 1996 order granting respondents summary judgment are attached to the petition as Appendix C and Appendix D, respectively.

[2]The December 12, 1997 order denying the petition for rehearing and suggestion for rehearing *en banc* is attached as Appendix B to the petition.

[3]Pursuant to Ninth Circuit Rule 36-3, the order may not even be cited to or by other courts in the Ninth Circuit.

consistent with a long line of earlier Ninth Circuit decisions which uniformly applied Section 301 preemption principles to bar state law privacy and related claims under nearly identical circumstances, as well as with numerous decisions from other circuits. Contrary to petitioners' assertion, the Ninth Circuit's order is also entirely consistent with this Court's Section 301 cases, including the decisions in *Livadas v. Bradshaw*, 512 U.S. 107, 114 S. Ct. 2068, 129 L. Ed. 2d 93 (1994), and *Hawaiian Airlines v. Norris*, 512 U.S. 246, 114 S. Ct. 2239, 129 L. Ed. 2d 203 (1994).

A. The Petition Mischaracterizes The Factual Circumstances Surrounding The August 18, 1995 Drug Search At Issue

The petition grossly exaggerates the factual circumstances surrounding the August 18, 1995 drug search at issue and ignores facts that are important for the Court's consideration of the petition. The relevant facts and supporting record evidence are set forth in the District Court's order granting respondents summary judgment (Appendix D to the petition).

Most notably, the petitioners were all employed with respondent Anheuser-Busch, Inc. ("ABI") pursuant to a collective bargaining agreement ("CBA") between ABI and their respective unions. The CBA's include provisions for drug testing, discipline and discharge, safety, and a grievance and arbitration procedure to challenge alleged violations of the CBA. The CBA covering petitioners McWilliams and Cortez also contains an express "management rights" clause.

For at least ten years before the August 18, 1995 search, ABI posted conspicuous signs at the employee entrances and exits advising employees of ABI's right to search employees and their vehicles parked on ABI property. ABI had an established practice to randomly search employees and employee property on ABI premises, and to discipline employees that refused to allow the search. ABI even used trained "sniff dogs" in an earlier locker room search. None of petitioners' unions ever challenged ABI's right to conduct searches, or to discipline employees as a result of the search or for refusing to allow the search, prior to the August 18, 1995 parking lot search at issue. The August 18, 1995 search was also consistent with ABI's longstanding policy prohibiting use or possession of drugs in the workplace.

ABI retained respondent Russ Whitmeyer And Associates, Inc. ("Whitmeyer"), a company with substantial experience assisting employers with drug elimination programs, to conduct the August 18, 1995 parking lot search. Whitmeyer used trained drug sniffing dogs to identify vehicles containing drug residue. If an employee's vehicle was identified as "positive," the employee was taken to a private room, along with his union steward, and asked to consent to a search of his vehicle and possessions. If the suspected employee refused to allow the search, the employee was suspended subject to termination. If illegal drugs or paraphernalia were discovered during the search, the employee was also suspended subject to termination. At no time during the search operation was anyone, including the petitioners, ever physically prevented from leaving the facility or subjected to any physical force.

B. ABI's Right To Conduct The August 18, 1995 Search Has Been Upheld By Five Separate Arbitrators

Petitioners Cameron and Bower were terminated as a result of the search; Cameron for refusing to consent to the search, and Bower for possession of drug paraphernalia. Petitioners Cameron and Bower filed grievances under the CBA challenging their terminations, and ABI's right to conduct the August 18, 1995 search, generally.[4] The grievances were pursued to arbitration, and both arbitrators held that ABI had the management right to conduct the August 18, 1995 search based on the terms of the CBA and its established practice to search employees on its property. Three other arbitrators reached the same conclusion in connection with grievances that were filed by other employees that were either terminated for refusing to consent to a search, or because drugs or paraphernalia were found in their vehicles.[5] In all five cases, the unions asserted that ABI breached the CBA in conducting the search. In all five cases, the arbitrators concluded that the search was permitted by the CBA. It is disingenuous, at best, for petitioners to assert that the CBA's are not at issue.

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[4]Petitioner McWilliams also filed a grievance challenging ABI's right to conduct the search but the grievance was resolved by his Union and ABI at the pre-arbitration step of the grievance procedure.

[5]These three employees filed their own action, and are represented by petitioners' attorney. Their lawsuit was also dismissed based on Section 301 preemption, and the appeal before the Ninth Circuit is still pending.

REASONS FOR DENYING THE PETITION

The Ninth Circuit's short, unpublished order summarily affirming the summary judgment for respondents is non-precedential. The order is consistent with other Ninth Circuit decisions, decisions from other circuits, and this Court's Section 301 cases. The full Ninth Circuit unanimously rejected petitioners' suggestion for a rehearing *en banc*. There is no "confusion" in the lower courts or conflict between the circuits as to any question raised by this case which is of such importance to warrant relief by this Court.

A. The Ninth Circuit Order Is Non-precedential

The Ninth Circuit's order summarily affirms the District Court's order granting respondents summary judgment. The order does not explain the basis for the ruling. (Appendix A) The order cannot be cited to or by other courts in the Ninth Circuit (Ninth Circuit Rule 36-3), much less by courts in other circuits. If the Section 301 issues raised by this case are as important and far reaching as petitioners suggest, they deserve a full discussion and analysis by a court of appeal before consideration by this Court. There is no sound reason for this Court to decide broad preemption issues based on the Ninth Circuit's one-line order.

B. The Ninth Circuit's Order Is Consistent With This Court's Section 301 Cases

The Ninth Circuit's order is entirely consistent with this Court's Section 301 preemption cases. As this Court has held, claims founded on rights created by a CBA are preempted by Section 301. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 394, 107 S. Ct. 2425, 96 L. Ed. 2d 318 (1987).

Moreover, state law claims which are substantially dependent on the analysis of a CBA are also preempted by Section 301. *Lingle v. Norge Div. of Magic Chef*, 486 U.S. 399, 405-6, 108 S. Ct. 1877, 100 L. Ed. 2d 410 (1988). In considering whether a state law claim requires analysis of a CBA and, therefore, is preempted, it is necessary to consider both express and *implied* terms of the CBA. *Consolidated Rail Corp. v. Railway Labor Exec. Assn.*, 491 U.S. 299, 109 S. Ct. 2477, 105 L. Ed. 2d 250 (1989) ("*Conrail*").

This Court's established Section 301 analysis has not been limited by *Livadas* or *Hawaiian Airlines* (referred to by petitioners as "*Norris*"). In *Hawaiian Airlines*, this Court held that the plaintiff's state law "whistle blower" claim was not preempted by the Railway Labor Act ("RLA") because only the employer's *motivation* for the plaintiff's discharge was at issue, not any rights or provisions under the CBA. *Hawaiian Airlines*, 129 L. Ed. 2d at 220. Significantly, this Court relied heavily on the earlier decision in *Conrail*, *supra*. In *Conrail*, this Court concluded that an employer's unilateral implementation of a drug testing policy was a "minor dispute" within the meaning of the RLA and, therefore, subject to the grievance and arbitration procedures of the CBA even though the CBA did not contain express provisions on drug testing. In discussing the *Conrail* decision, this Court noted that characterizing a dispute as "minor" under the RLA "is another way of saying that the dispute *does not involve rights that exist independent of the CBA*." *Hawaiian Airlines*, 129 L. Ed. 2d at 219 (emphasis added).

The instant case does not involve a state law whistle blower claim that only concerns respondents' motives. On the contrary, unlike in *Hawaiian Airlines*, respondents' motives are of no consequence here. Moreover, this Court's recognition that privacy rights relating to drug testing do not

exist independent of a CBA further supports the Ninth Circuit's order that petitioners' state law privacy and related claims are preempted by Section 301.[6]

In *Livadas*, a unionized employee brought a civil rights action against California's wage enforcement agency under 42 U.S.C. § 1983 based on the agency's refusal to enforce the employee's statutory claim for late payment of wages under Cal. Labor Code § 203. This Court held that the agency's blanket refusal to enforce unionized employees' statutory claims for late payment of wages under Cal. Labor Code § 203 interfered with the employees' exercise of union activities and, therefore, was preempted by the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 *et seq.* *Livadas*, 129 L. Ed. 2d at 101-2. This Court rejected the agency's argument that Section 301 prohibited its enforcement of Cal. Labor Code § 203 for unionized employees. In concluding that Section 301 did not compel the agency's enforcement policy, this Court noted that Section 301 preemption has generally been applied to preclude state laws relating to the interpretation or enforcement of a CBA, or re-labeled state tort claims that derive from the CBA (like petitioners' claims here). *Livadas*, 129 L. E. 2d at 109. Where the state law claim is independent of rights under a CBA, Section 301 preemption does not apply. *Livadas*, 129 L. Ed. 2d at 110. This Court held that Section 301 did not bar the agency's enforcement of

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[6]It is also noteworthy that the holding in *Hawaiian Airlines* is based on the same rationale applied by the Ninth Circuit when holding state law discrimination claims are not preempted by Section 301. *Ramirez v. Fox Television Station*, 998 F.2d 743, 748-49 (9th Cir. 1993) (state law discrimination claim is not preempted by Section 301 because only the employer's discriminatory intent is at issue).

Cal. Labor Code § 203 because the employee's entitlement to a statutory penalty for her employer's late payment of wages was not derived from the CBA. *Id.* Significantly, this Court noted, however, that even a claim under Cal. Labor Code § 203 could be preempted by Section 301 where the CBA was at issue. *Livadas*, 129 L. Ed. 2d at 110-11 n. 19.

The Ninth Circuit's order here is completely consistent with *Livadas*, *Hawaiian Airlines*, and this Court's other Section 301 cases. There is no compelling reason to review the Ninth Circuit's order.

C. The Ninth Circuit's Order Is Consistent With Other Ninth Circuit Cases

The order affirming summary judgment for respondents is also supported by other Ninth Circuit cases holding state law privacy and related claims are preempted by Section 301 under nearly identical circumstances. *Schlacter-Jones v. General Tel. of California*, 936 F.2d 435, 440-42 (9th Cir. 1991) (Section 301 preempts state law privacy, fraud, conspiracy, intentional infliction of emotional distress, contract and covenant of good faith and fair dealing claims arising out of employer's unilaterally imposed drug testing policy); *Stikes v. Chevron USA, Inc.*, 914 F.2d 1265, 1269 (9th Cir. 1990), *cert. denied*, 500 U.S. 917, 111 S. Ct. 2015, 114 L. Ed. 2d 101 (1991) (state law claims for invasion of privacy, wrongful discharge and intentional infliction of emotional distress arising out of employer's vehicle search policy preempted by Section 301); *Utility Workers of America, Local No. 246 v. Southern California Edison, Co.*, 852 F.2d 1083, 1086 (9th Cir. 1988), *cert. denied*, 489 U.S. 1078, 109 S. Ct. 1530, 103 L. Ed. 2d 835 (1989) (state law privacy and wrongful termination claims

arising out of employer's unilateral random drug testing program preempted by Section 301); *Laws v. Calmat*, 852 F.2d 430, 433 (9th Cir. 1988) (Section 301 preempts state law privacy claim based on employer's unilateral drug testing policy); *Scott v. Machinists Automotive Trades Dist. Lodge No. 190*, 827 F.2d 589, 594 (9th Cir. 1987) (defamation claim arising out of misconduct investigation preempted by Section 301).[7]

There is nothing in *Hawaiian Airlines* or *Livadas* that would warrant review of the Ninth Circuit's order here. These cases actually further support the Ninth Circuit's preemption ruling because they reaffirm that claims which do not exist independent of a CBA, like petitioners' claims here, are preempted. As this Court has held, claims relating to an employer's drug testing/search policy are not independent of a CBA. The earlier Ninth Circuit cases all follow this principle.[8]

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[7]While the Ninth Circuit has not considered when a false imprisonment claim may be preempted, it has repeatedly held claims which are merely "peripheral" to a preempted privacy claim are also preempted. *Stikes*, 914 F.2d at 1270. See *Romero v. Hilton Hotels Corp.*, 137 L.R.R.M. (BNA) 2647, 2649-50 (D. Hawaii 1991) (assault, battery, false imprisonment, and infliction of emotional distress claims arising out of employer's theft investigation preempted by Section 301).

[8]Petitioners incorrectly assert that recent Ninth Circuit decisions have adopted a more narrow application of Section 301 preemption after *Livadas* and *Hawaiian Airlines*. *Felt v. Atchison, Topeka & Santa Fe Railway Co.*, 60 F.3d 1416 (9th Cir. 1995); *Espinal v. Northwest Airlines*, 90 F.3d 1452 (9th Cir. 1996). These cases follow earlier Ninth Circuit decisions holding that statutory discrimination claims are non-negotiable and, therefore,

D. The Full Ninth Circuit Unanimously Rejected Petitioners' Suggestion For Rehearing *En Banc*

Not only does the Ninth Circuit's order comport with its prior Section 301 decisions, the full Ninth Circuit unanimously rejected petitioners' suggestion for a rehearing *en banc*. (Appendix B) That not even one Circuit Judge voted to rehear this case *en banc* further demonstrates that the order is in the mainstream, and does not warrant further review by this Court.

E. The Ninth Circuit's Order Is Consistent With Decisions From Other Circuits

Far from creating a conflict between the circuits, the Ninth Circuit's order is consistent with the great weight of authority from other circuits as well. *See, e.g., Sweigart v. Delmotte*, 148 L.R.R.M. (BNA) 2413, 2415-17 (E.D. Pa. 1994), *affirmed*, 74 F.3d 1228 (3rd Cir. 1995) (Section 301 preempts state law violation of privacy claim resulting from employer's surveillance of employee bathroom); *Mock v. T.G. & Y. Stores Co.*, 971 F.2d 522, 529-30 (10th Cir. 1992) (state law claims for invasion of privacy, defamation, false imprisonment, intentional infliction of emotional distress, wrongful termination, and covenant of good faith and fair dealing arising from employer's interrogation of employees were preempted by Section 301); *In Re Amoco Petroleum Additives Co.*, 964 F.2d 706, 710 (7th Cir. 1992) (state law claims for invasion of privacy and infliction of emotional distress based on employer's use of surveillance

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not preempted by Section 301. On the other hand, privacy and related claims are negotiable, and are preempted by Section 301. *Schlacter-Jones*, 936 F.2d at 442.

cameras in employee locker room are preempted by Section 301); *Bagby v. General Motors Corp.*, 976 F.2d 919, 921-22 (5th Cir. 1992) (defamation and intentional infliction claims arising out of theft investigation preempted); *Jackson v. Liquid Carbonic Corporation*, 863 F.2d 111, 119 (1st Cir. 1988), *cert. denied*, 490 U.S. 1107, 109 S. Ct. 3158, 104 L. Ed. 2d 1021 (1989) (state law invasion of privacy claim based on employee's termination for failing drug test preempted by Section 301); *Kirby v. Allegheny Beverage Corp.*, 811 F.2d 253, 256 (4th Cir. 1987) (invasion of privacy claim based on employer's request to search employee's person and vehicle preempted by Section 301); *Strachan v. Union Oil Co.*, 768 F.2d 703, 705-6 (5th Cir. 1985) (defamation, false imprisonment, and false arrest claims arising out of drug investigation preempted by Section 301); *Blanchard v. Simpson Plainwell Paper Co.*, 925 F. Supp. 510 (W.D. Mich. 1995) (false imprisonment claim arising out of drug investigation preempted); *Kelly v. Mercoid Corporation*, 776 F. Supp. 1246, 1253-55 (N.D. Ill. 1991) (state law privacy claim based on employee's termination for refusing urinalysis test preempted by Section 301); *Majors v. U.S. Air, Inc.*, 525 F. Supp. 853, 857 (D. Md. 1981) (false imprisonment and defamation claims arising out of theft investigation preempted).

Even petitioners recognize that the lower courts generally continue to hold state law privacy and related claims are preempted by Section 301. *Proffitt v. International Paper Co.*, 953 F. Supp. 207, 211-12 (S.D. Ohio 1996); *Dancy v. Fina Oil & Chemical Co.*, 921 F. Supp. 1532, 1537-38 (E.D. Tex. 1996); *Wall v. Americold Corp.*, 1997 U.S. Dist. LEXIS 10366 (E.D. Pa. 1997).

Petitioners argue that the lower courts are "confused" and need further guidance on the application of Section 301

to privacy and related claims. Respondents disagree. The few district court or state court decisions that have concluded privacy related claims are not preempted are contrary to the great weight of authority. These cases are inconsistent with the mainstream decisions on Section 301 preemption. That petitioners and a few, isolated lower courts may be "confused" does not warrant review of the Ninth Circuit's order.

CONCLUSION

For all the foregoing reasons, the petition should be denied.

DATED: March 31, 1998

Respectfully submitted,

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